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**HOUSE BILL 9**

**47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SPECIAL SESSION, 2005**

**INTRODUCED BY**

**W. Ken Martinez**

**AN ACT**

**RELATING TO BUSINESS; ENACTING THE EMERGENCY ANTI-PRICE-GOUGING ACT; PROVIDING PENALTIES; MAKING AN APPROPRIATION; DECLARING AN EMERGENCY.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:**

**Section 1. SHORT TITLE. -- This act may be cited as the "Emergency Anti-Price-Gouging Act".**

**Section 2. LEGISLATIVE FINDINGS AND PURPOSE. -- The legislature finds that during emergencies and disasters that affect the health, welfare and safety of consumers, persons may take unfair advantage of consumers by greatly increasing prices for essential goods or services. While the pricing of goods and services is generally best left to the marketplace under ordinary conditions, when a declared disaster or emergency results in abnormal disruptions of the market, the public**

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1 interest requires that excessive or unjustified increases in  
2 the prices of essential goods or services be prohibited. It is  
3 the intent of the legislature in enacting the Emergency Anti-  
4 Price-Gouging Act to protect consumers from excessive and  
5 unjustified increases in the prices charged during or shortly  
6 after a declared state of disaster or emergency for goods or  
7 services that are vital and necessary for the health, safety  
8 and welfare of consumers.

9 Section 3. DEFINITIONS.--As used in the Emergency Anti-  
10 Price-Gouging Act:

11 A. "abnormal market disruption" means any change in  
12 the market, whether actual or imminently threatened, resulting  
13 from an emergency or disaster where market forces are or appear  
14 likely to be insufficient to ensure reasonably stable prices of  
15 goods or services;

16 B. "goods or services" means any goods or services  
17 necessary to preserve, protect or sustain the life, health or  
18 safety of persons or their property, including gasoline,  
19 natural gas, heating oil and other fuels; repair or  
20 reconstruction services; and the rental of residential,  
21 commercial and storage facilities or space;

22 C. "motor fuel" means any liquid product used for  
23 the generation of power in an internal combustion engine,  
24 excluding liquified petroleum gases and aviation fuels; and

25 D. "person" means an individual, corporation,

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1 business trust, estate, trust, partnership, limited liability  
2 company, association, joint venture or any legal or commercial  
3 entity, including any individual or entity within the chain of  
4 distribution of goods or services such as a manufacturer,  
5 supplier, wholesaler, distributor or retail seller.

6 Section 4. PROHIBITED PRACTICES. --

7 A. Upon any federal or state declaration of  
8 emergency or disaster and a determination by the governor by  
9 executive order that the emergency or disaster has caused or  
10 appears likely to cause an abnormal market disruption within  
11 the state, it is a violation of the Emergency Anti-Price-  
12 Gouging Act for any person to sell, rent or lease, or to offer  
13 to sell, rent or lease, regardless of whether an actual sale,  
14 rental or lease occurs during the time period set forth in  
15 Subsection B of this section, goods or services for an  
16 unconscionable price.

17 B. The period of time during which the restrictions  
18 imposed by Subsection A of this section are in effect is from  
19 the issuance by the governor of an executive order that an  
20 abnormal market disruption exists within the state until the  
21 date that the governor determines by executive order that the  
22 abnormal market disruption has ceased.

23 Section 5. UNCONSCIONABLE PRICE. --

24 A. In any proceeding brought pursuant to the  
25 Emergency Anti-Price-Gouging Act, evidence that the amount

1 charged by the alleged violator was more than ten percent above  
2 the average price in the same market area during the thirty  
3 days prior to the event causing the emergency or disaster that  
4 resulted in the abnormal market disruption shall constitute  
5 prima facie evidence that the price was unconscionable and  
6 constituted a violation of Section 4 of that act.

7 B. In determining whether a price is  
8 unconscionable, the finder of fact shall take into  
9 consideration the totality of the circumstances, including the  
10 following factors:

11 (1) whether there was an exercise of unfair  
12 leverage by the alleged violator;

13 (2) a comparison between the price sought for  
14 the goods or services by the alleged violator and the average  
15 price of those same or similar goods or services in the same  
16 market area during the thirty days prior to the event causing  
17 the emergency or disaster that resulted in the abnormal market  
18 disruption;

19 (3) the degree to which the price sought by  
20 the alleged violator would have resulted in a profit margin  
21 greater than the alleged violator's usual and customary profit  
22 margin; and

23 (4) whether an increase in the price sought  
24 for goods or services is directly attributable to additional  
25 costs imposed by a supplier of a good or service or other cost

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1 of providing the good or service, including an additional cost  
2 for labor or materials used to provide goods or services. In  
3 determining an alleged violator's additional costs, no  
4 allowance shall be made for the replacement costs of goods if  
5 the alleged violator was reasonably assured of recouping the  
6 replacement costs as a part of the price of subsequent sales of  
7 the goods or services.

8 Section 6. INCREASES IN MOTOR FUEL PRICE. -- During the  
9 period of time set forth in Subsection B of Section 4 of the  
10 Emergency Anti-Price-Gouging Act, a retail dealer shall not  
11 increase the retail price of motor fuel more frequently than  
12 once in twenty-four hours.

13 Section 7. PENALTIES, REMEDIES AND ENFORCEMENT. --

14 A. A person who violates the restrictions set forth  
15 in Section 4 of the Emergency Anti-Price-Gouging Act is guilty  
16 of a misdemeanor and shall be punished by a fine of not more  
17 than one thousand dollars (\$1,000) or by imprisonment for a  
18 definite term not to exceed one year, or both.

19 B. Each instance of selling, renting or leasing  
20 goods or services at a price that violates the restrictions set  
21 forth in Section 4 of the Emergency Anti-Price-Gouging Act  
22 constitutes a separate violation of that act.

23 C. Upon a finding by a court that a person has  
24 engaged in continuous and willful violations of the Emergency  
25 Anti-Price-Gouging Act, the court may suspend or revoke any

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1 license or certificate authorizing that person to engage in  
2 business in the state or may enjoin that person from engaging  
3 in business in the state.

4 D. Nothing in this section precludes a private  
5 cause of action pursuant to Section 57-12-10 NMSA 1978 on  
6 behalf of any person damaged by a violation of Section 4 of the  
7 Emergency Anti-Price-Gouging Act. Where the trier of fact  
8 finds that the defendant violated that act, the court may award  
9 to the prevailing party up to three times actual damages or one  
10 thousand dollars (\$1,000), whichever is greater, and the court  
11 shall award reasonable attorney fees and costs.

12 E. Where a person is found to have charged an  
13 unconscionable price in violation of Section 4 of the Emergency  
14 Anti-Price-Gouging Act, the court may require that person to  
15 disgorge excess profits realized as a result of such  
16 violations.

17 F. The remedies and penalties set forth in this  
18 section are cumulative and do not preclude another remedy or  
19 penalty available pursuant to the laws of this state.

20 Section 8. APPLICATION OF UNFAIR PRACTICES  
21 ACT--REGULATIONS.--A violation of the Emergency Anti-Price-  
22 Gouging Act constitutes an unfair or deceptive trade practice  
23 and an unconscionable trade practice pursuant to the Unfair  
24 Practices Act and is subject to all of the provisions and  
25 remedies of that act. The attorney general has all of the

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1 authority given under the Unfair Practices Act and is empowered  
2 to issue and file as required by law all regulations necessary  
3 to implement and enforce any provision of the Emergency Anti-  
4 Price-Gouging Act.

5 Section 9. EMERGENCY CIVIL INVESTIGATIVE DEMANDS. -- In  
6 addition to any other authority given to the attorney general  
7 to investigate alleged violations of the Emergency Anti-Price-  
8 Gouging Act, when the governor has issued an executive order  
9 pursuant to Subsection A of Section 4 of that act, the attorney  
10 general may serve a civil investigative demand pursuant to  
11 Section 57-12-12 NMSA 1978 and may require the person to whom  
12 the demand is directed to respond within three business days.

13 Section 10. ASSISTANCE FROM STATE AGENCIES. -- When the  
14 governor has issued an executive order pursuant to Subsection A  
15 of Section 4 of the Emergency Anti-Price-Gouging Act, all state  
16 agencies, including the department of public safety, the  
17 energy, minerals and natural resources department and the New  
18 Mexico department of agriculture, shall cooperate with the  
19 attorney general in the investigation of alleged violations of  
20 that act.

21 Section 11. PREEMPTION. -- The Emergency Anti-Price-Gouging  
22 Act does not preempt any local ordinance prohibiting conduct  
23 that is the same or similar to conduct prohibited by Section 4  
24 of that act or imposing penalties more severe than those  
25 imposed by that act.

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1           Section 12. NOTICE PROVISIONS. -- Upon the governor's  
2 issuance of an executive order regarding an abnormal market  
3 disruption pursuant to Subsection A of Section 4 of the  
4 Emergency Anti-Price-Gouging Act, the office of the governor  
5 shall notify, as soon as possible, the public and those  
6 registered with that office for the purpose of receiving notice  
7 of the issuance of such an executive order. That office shall  
8 notify the public by any means available, including the  
9 office's web site, news media and electronic mail. Any person  
10 may register with that office for the purpose of receiving such  
11 notification.

12           Section 13. ANTI-PRICE-GOUGING FUND CREATED--  
13 APPROPRIATION. --

14           A. The "anti-price-gouging fund" is created in the  
15 state treasury and shall be administered by the attorney  
16 general. The fund shall consist of money transferred from the  
17 general fund operating reserve pursuant to Section 14 of the  
18 Emergency Anti-Price-Gouging Act and any other appropriations,  
19 gifts, grants or donations.

20           B. Money in the fund is appropriated to the  
21 attorney general for the investigation and prosecution of  
22 alleged violations of the Emergency Anti-Price-Gouging Act,  
23 including expenses of other state agencies involved in such  
24 investigations. Money in the fund shall not revert at the end  
25 of a fiscal year but shall remain to the credit of the fund

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1 until such time as the attorney general determines that the  
2 investigation and prosecution of alleged violations of the  
3 Emergency Anti-Price-Gouging Act have been completed.

4 Section 14. EMERGENCY TRANSFER OF FUNDS.--In the event  
5 the governor issues an executive order pursuant to Subsection A  
6 of Section 4 of the Emergency Anti-Price-Gouging Act, the  
7 governor, with state board of finance approval, may immediately  
8 transfer from the general fund operating reserve to the anti-  
9 price-gouging fund the amount necessary, in a total not to  
10 exceed one million dollars (\$1,000,000), for the investigation  
11 and prosecution of alleged violations of that act.

12 Section 15. LIBERAL INTERPRETATION.--The Emergency Anti-  
13 Price-Gouging Act shall be liberally construed to carry out its  
14 purpose.

15 Section 16. SEVERABILITY.--If any part or application of  
16 the Emergency Anti-Price-Gouging Act is held invalid, the  
17 remainder or its application to other situations or persons  
18 shall not be affected.

19 Section 17. EMERGENCY.--It is necessary for the public  
20 peace, health and safety that this act take effect immediately.